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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1963

No. 104

IKE J. DAVIS, ET UX, *Petitioners*

v.

DEXTER BARR, CHAIRMAN, MISSISSIPPI STATE TAX COMMISSION, ET AL., *Respondent*

## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI

IKE J. DAVIS,
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*Petitioners*

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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DEXTER BARR, CHAIRMAN, MISSISSIPPI STATE TAX COMMISSION, ET AL., *Respondent*

---

## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI

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Petitioning for a writ of certiorari to the Supreme Court of the State of Mississippi, to review the judgment there affirming dismissal of their bill in Chancery Court to vacate an assessment of State income tax deficiency and to suppress collection thereunder, petitioners show and state,—

### OPINION BELOW

The opinion here subject is reported at M (157 So. (2d) 505). Motion for rehearing denial (suggestions of error overruled, under Mississippi practice) is not found reported.

The decree of dismissal, with letter statement of reasons, will be found hereunto annexed as *Appendix "A"* and *Appendix "B"*, respectively.

The opinion below and the order overruling suggestion of error are similarly annexed, as *Appendix "C"* and *Appendix "D"*, respectively.

The request for administrative hearing, pursuant to the opinion below, and its denial, are annexed as *Appendix "E"* and *Appendix "F"*, respectively; similar documents respecting administrative appeal are annexed as *Appendix "G"* and *Appendix "H"*, respectively.

## JURISDICTION

The jurisdiction of this Court is invoked under authority of the provisions in *28 U.S.C. Sec. 2101.*

The judgment sought here to be reviewed was dated 18 November 1963, and the order overruling the suggestion of error was dated 13 January 1964; its entry was stayed until a date not more than 90 days from 25 January 1964 by order on that date entered.

## QUESTIONS PRESENTED

1. When the State voluntarily destroys an income tax return seasonably filed and fully paid, thereafter undertaking an assessment of deficiency against such return without reference to any returned or omitted income, has the State thus discriminated against the federal rights of equal application of laws and due process, the original return being essential under the tax law to such additional assessment, defense against it or in refund proceedings for recovery?

2. If the assessment in those circumstances be constitutional, were petitioners denied due process or equal protection of laws by judicial refusal to give them access to an impartial hearing in these circumstances?

3. Were petitioners deprived of a federal constitutional immunity and privilege when the decision here subject placed upon them a tax duty not prescribed by the legislature?

## STATUTE INVOLVED

The only statute involved is the Mississippi State Income Tax Law—Sec. 9220 Miss. Code 1942, Rec. (1962 Supp. Pages 46-71). The pertinent text from that lengthy statute will be found hereunto annexed as *Appendix "I"*.

The constitutional provisions involved are those found in the Constitution of the State of Mississippi, Sections 14 and 24. The provisions of the Constitution of the United States are involved, particularly the Fourteenth Amendment. Both are published officially in Miss. Code 1942, Rec. Vol. 1 (Pages 143 and 185 for the Mississippi provisions; page 71 for the Federal) annexed as *Appendix "J"* and *Appendix "K"* respectively.

## STATEMENT

Petitioners filed their annual State income tax returns for each of the several tax years of 1945-1954 involved here and paid the tax there shown to be due. (R. 4—Complaint, Par. 2; R. 26—Answer, Par. 2) The last return and payment for those several years were accomplished in 1955. Sometime prior to April 5, 1961, all those returns were destroyed by the State tax authorities. (R. 50—Letter of advice from re-

spondent, copied hereinafter as *Appendix "L"* for convenience.) Later, or on June 1, 1961, the destruction was authorized by the State Tax Commission in session. (R. 34—Minutes, copied hereinafter as *Appendix "M"* for convenience.)

Then, and prior to October 16, 1961, respondents issued assessment for additional tax due from the destroyed returns (R. 62—From opinion below) but did so without examination of any of the returns. (R. 27—Answer, Par. 4, 3rd Sentence). Warrant of restraint was issued by respondents as part of the collection processes under the additional assessment. (R. 29—Answer, Par. 6)

This suit followed below and, after removal (from the home county of petitioners to the home county of respondents) general demurrer of respondents was overruled. (R. 24—Decree, copied hereinafter as *Appendix "N"* for convenience.) Respondents filed special pleas to the jurisdiction after answer, and such pleas were overruled. (R. 38—Decree, copied hereinafter as *Appendix "O" for convenience.*) Then, on motion by respondents for *subpoena duces tecum*, opposed by petitioners, the cause was dismissed on ground of failure to exhaust administrative remedies. (R. 52-53—Decree, *Appendix "A"*, *Appendix "B"*)

The appeal resulting in the decision here subject was from that final decree.

The questions of constitutionality were raised in the initial pleadings. (R. 5-6—Complaint, Par. 5) The constitutional questions were not considered by the Chancery Court when dismissing. They again were presented to the Supreme Court of Mississippi (R. 63—Opinion here subject, at its page 2, *Appendix "C"*)

The State Supreme Court did not touch on this issue, except to the extent to be inferred from acknowledgment of judicial relief for unconstitutional laws and reference to judicial relief in lieu of pointless administrative remedies. (R. 76—Opinion, at its page 15, *Appendix "C"*)

## AUTHORITY AND REASONS FOR GRANTING THE WRIT

A. The substantial federal question of discrimination against petitioners and their federally protected right to equal protection of the laws and to due process has not been decided by this Court on the fact of additional state income tax assessments against returns voluntarily destroyed by the State. Those whose returns were not so destroyed or assessed enjoy completely a privilege which was denied to petitioners by such acts. *Zucht* v. *King*, 43 S. Ct. 24, 25 (260 U.S. 174, 176), 67 L. ed. 194. (Op. 7)

B. The substantial federal question of due process was decided below in a manner that conflicts with the line of decisions from this Court on such question as related to taxation by the states.

(1) The State Supreme Court has always held that the State income tax laws are to be construed favorably to taxpayers. *Stone, Chairman, State Tax Commission* v. *General Box Co., et al.*, M. (53 So. (2d) 85—Op. 1); *Stone* v. *Reichman-Crosby Co.*, M. (43 So. (2d) 184—Op. 8) appeal dismd.; cert. den. S. Ct. (339 U.S. 917), 94 L. ed. 1342. Also, it has held consistently that State income tax returns are presumed correct and require affirmative showing of error before additional assessment. *Broadhead* v. *Stone*, 218 M. 911 (58 So. (2d) 803).

(2) Similarly, the State Supreme Court has held that a statute of limitations once expired extinguished the right of a tax authority to proceed. *State ex rel. Tully v. Mutual Life Ins. Co. of N.Y.*, 189 M. 830 (198 So. 763), and that a statute of limitations exceeded on face of an action renders the action void. *Lampton-Reid Co. v. Allen*, M. (171 So. 783)

(3) The same Court, with deference, recognized in the decision here subject that direct access to the judiciary, rather than administrative remedies, is available for void assessments or in cases where administrative remedy would be of no avail. (Opinion, *Appendix "C"*, p. 15). And it has so held even where there is an anti-suit statute (discussed in the opinion, at Pages 16-17). *Hayley v. Mississippi Levee Comrs.*, 70 M. 141 (23 So. 580)

(4) The statute (Sec. 9220-25 (2) Miss. Code 1942, *Appendix "I"*) requires additional assessments to be made only in compliance with provisions of that section, namely, examination of the return. It follows that any additional assessment made otherwise is void. Mississippi tax agencies find their authority only in the statute they administer. *Chickasaw County v. Gulf, M. & O. R. Co.*, M. (15 So. (2d) 348) It is cognizable, also, that proceedings in these circumstances would be of no avail because respondents are dedicated to rejection here. Their pleadings and in fact the issuance of distraint testify to their dedication to rejection for this cause.

The decisions of the State Supreme Court having advised petitioners they were not obliged to proceed administratively, petitioners were unconstitutionally trapped to their irreparable harm when the decision

here subject forced them back into administrative channels, but without a weapon (their essential returns having been voluntarily destroyed by the State before making the additional assessment). That state of affairs was decided by the State Court, with deference, in a manner that conflicts with the decision of this Court on the same substantial case. *Brinkerhoff Faris Tr. & Sav. Co. v. Hill*, 50 S. Ct. 451 (281 U.S. 673), 74 L. ed. 1107.

The decision below, with deference, conflicts with the decisions from this Court wherein it has long been held that due process requires a fair hearing at some stage of the proceedings. See, *e.g.*, *Nickey v. Mississippi*, 54 S. Ct. 743 (292 U.S. 393), 78 L. ed. 1323. It is deemed by petitioners to be accepted that they could receive no impartial hearing administratively had they gone in the first instance into administrative channels. An agency which destroys an essential return, makes an additional assessment on such return without reference to statutory requirement and then issues warrants of distraint for the additional account, is not believed to be impartial toward that particular taxpayer.

Even so, petitioners, after the surprising inconsistency between the decision here and all former decisions, sought access to administrative channels. They were denied. (*Appendices "E"-"H"*) Now, they have no forum to hear them, except this Court.

Should petitioners be required to pay this assessment, they could not receive a refund in any action for recovery. They have no way to prove their original returns, since they were destroyed by the State. Such returns are essential for either a defense

against the additional assessment or as basis for its refund if paid. *Grosjean v. American Press Co.*, 56 S. Ct. 444 (297 U.S. 233), 80 L. ed. 660; *cf. Newport v. Tax Comm.*, 219 Wis. 293 (261 N.W. 884), cert. den. 56 S. Ct. 598 (297 U.S. 720), 80 L. ed. 1004; *Phillips v. Dime Trust & Sav. D. Co.*, 52 S. Ct. 46 (284 U.S. 160), 76 L. ed. 2220.

When holding that administrative remedy was exclusive in these circumstances, the Court below, with deference, decided the equal protection and due process questions in conflict with the holdings of this Court that such circumstances as these give taxpayers access to the judiciary initially. *Ogden City v. Armstrong*, 18 S. Ct. 98 (168 U.S. 204), 42 L. ed. 444; *Stanley v. Albany County*, 7 S. Ct. 1234 (121 U.S. 535), 30 L. ed. 1000.

Petitioners pleaded (R. 4—Complaint, Par. 4) that the assessment was undertaken more than three years after the last of the returns was filed. Respondents admitted that fact (R. 27—Answer, Par. 4). The decision below, however (*Appendix "C"* at Page 14) concludes that it was necessary for this defense to plead the 6-year statute found in Sec. 9220-25(4) Miss. Code 1942, Rec. (*Appendix "I"*) rather than that under Sec. 9220-25(1).

Such a construction, with deference, is in conflict with the prior decisions of the Court below and conflicts with the uniform line of decisions from this Court on the federal question of due process involved. *State ex rel. Gully v. Mutual Life Ins. Co. of N.Y.*, *supra*. Making a revivor against the repose of the statute; and against the State inhibition of taxing acts when so reposed, deprived petitioners of due process of law federally protected to them. *Nelson v. Sears, R. & Co.*,

61 S. Ct. 586 (312 U.S. 359), 85 L. ed. 888 (Op. 1); *Greene v. Louisville and N. R. Co.*, 37 S. Ct. 673 (244 U.S. 499), 61 L. ed. 1280; *Delaware, L. & W. R. Co. v. Pennsylvania*, 25 S. Ct. 669 (198 U.S. 341), 49 L. ed. 1977.

## CONCLUSION

Petitioners seek only a forum in which they may make their defense against this assessment. They chose the route which their Supreme Court had taught them was open and, really, expected to be used. They were not prepared judicially for the exclusive remedy of this decision, neither were they prepared judicially for the closing of administrative doors by secret acts of the State.

They have suffered irreparably from this new view of the law.

Petitioners believe also that this question of action on returns by State tax authorities after voluntary destruction tends to be national in its effect. They, and taxpayers throughout the states need the benefit of final judicial review with respect to equal protection and due process as substantial federal questions.

Respectfully submitted,

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## APPENDIX A

[52] Book 229 Pages 116 and 117

IN THE CHANCERY COURT OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI

No. 60,947

IKE L. DAVIS AND BERT EVELYN DAVIS, *Complainants*

vs.

NOEL MONAGHAN, Individually and as Chairman of the Mississippi State Tax Commission as Ex Officio Commissioner of State Income Tax, and

H. N. EASON, Individually and as Chief of Mississippi State Tax Commission, Division of Income Tax,

*Defendants*

### Final Decree

This day this cause came on for hearing, there being present representing the complainants, Honorable deQuincy V. Sutton and Honorable Lyle V. Corey, attorneys at law, Meridian, Mississippi, and there also being present and representing the defendants, Honorable John E. Stone, attorney at law, Jackson, Mississippi, and the Court having heard and considered this matter and being of the opinion that the matter set forth in the answer of the defendants, by way of plea, in paragraphs 11 and 12 should be sustained, and that such plea goes to the heart of the suit:

IT IS, THEREFORE, HEREBY ORDERED, ADJUDGED and DECREED that the complainants in this cause have failed, neglected and refused to avail themselves in any manner of the administrative procedures as contained in Sections 9220-25 and 9220-31, Mississippi Code of 1942, and having refused and neglected to exhaust their administrative remedies or even to initiate same, complainants have

no standing in this Court and this Court is, [53] therefore, without jurisdiction in the premises; therefore, the Bill of Complaint filed in this cause is hereby dismissed at the cost of complainants for which and all of which let execution issue.

ORDERED and ADJUDGED on this the 22nd day of March, 1963.

/s/ S. V. ROBERTSON, JR.
Chancellor.

FILED
Mar. 22, 1963
FRANK T. SCOTT
Chancery Clerk
By /s/ R. W. Sims D. C.

## APPENDIX B

[105]

CHANCERY COURT
HINDS COUNTY
JACKSON, MISSISSIPPI

March 21, 1963

Hon. Lyle V. Corey,
Lamar Building,
Meridian, Mississippi

Hon. John E. Stone,
State Tax Commission,
Jackson, Mississippi

Hon. deQuincy C. Sutton
Dixie Towers,
Meridian, Mississippi

No. 60,947

IKE J. & BERT EVELYN DAVIS, *Complainants*

v.

NOEL MONAGHAN, H. N. EASON, etc., *Defendants*

Dear Friends,

I have carefully studied all the pleadings filed in the above cause and the law and cases cited by each of you in your arguments. My opinion is that the separate pleas contained in Paragraphs 11 and 12 of the Answer of the Defendants should be sustained and the cause dismissed.

I feel that the law is clear that until a Complainant has exhausted his administrative remedies specifically provided by statute, he is not entitled to invoke extraordinary relief by way of injunction in a Chancery Court. I realize that my opinion is contrary to that of Chancellor J. C. Stennett wherein he overruled the special pleas by a decree dated July 5, 1962, but the case has not yet been tried on its merits and, feeling as I do about the special pleas, it

would be a vain and foolish thing for me to try this case on its merits and then to decide it on the basis of the matters set forth in the special pleas.

Now I feel that the argument made by Mr. Corey, with reference to statutes of limitation applying to all or a portion of the additional income taxes demanded, merits very serious consideration, but this can be considered by the State Tax Commissioner and the State Tax Commission in hearings before them, and it might be that this matter can be disposed of in an administrative hearing.

With kind personal regards to each of you, I am,

Sincerely,

/s/ STOKES V. ROBERTSON, JR.
Stokes V. Robertson, Jr.
Chancellor

SVRjr/g

## APPENDIX C

[62] IN THE SUPREME COURT OF MISSISSIPPI

No. 42,791

IKE J. DAVIS, ET UX

vs.

DEXTER BARR, CHAIRMAN, MISSISSIPPI STATE TAX COMMISSION, ET AL.

RODGERS, *Justice:*

This is an action brought by appellants for the alleged purpose of suppressing an assessment for state income taxes for the taxable years of 1945 through 1954.

Appellants filed an original bill in the Chancery Court of Lauderdale County, Mississippi, on October 16, 1961, alleging that Noel Monaghan, then Tax Commissioner, was Chairman of the Mississippi State Tax Commission, and that H. N. Eason was Chief of Division of Income Tax, and that they had an established office in Lauderdale County, Mississippi. It was further alleged that the complainants filed income tax returns for the taxable years 1945-1954, and paid taxes shown therein to be due.

[63] It is alleged that these returns were destroyed by the Tax Commissioner without notice to complainant, and thereafter at a time, more than three years, after the tax returns were filed; the Commissioner, Noel Monaghan, and H. N. Eason, demanded of the complainants the sum of $13,693.16, with interest. This amount was alleged to be more than the amount due as shown by the tax returns filed. It is alleged the assessment was not made on the basis of an examination of the tax returns, and was therefore not made in a manner contemplated by law.

It is said in the bill that the complainants are unable to show that the returns were correct because they have

been destroyed. But that the returns were correct. It is alleged that the demand and assessment of the Commission is a lien on complainants' home in Lauderdale County, and unless the demand is paid before the 20th day of October 1961, their property will be seized for the satisfaction of the assessment. Complainants insist that the foregoing facts prevent them from obtaining "due process of law", and that such facts violate their constitutional rights under the Constitution of the United States and the Constitution of the State of Mississippi. Appellants claim that § 9220-27 (9), Code 1942, Rec., does not apply to
64 this action, and that the named individuals are liable for attorney's fees required to be paid by complainants in defending the excessive and unauthorized acts, an invasion of complainants' constitutional rights by defendants.

The case was transferred to the Chancery Court of Hinds County (First District) on motion of defendants, where a general demurrer to the original bill was overruled. The defendants filed their answer admitting the assessment but denying that it was unlawfully made in violation of complainants' constitutional rights, nor without due process of law. The defendants incorporated in their answer, by way of a plea, a denial of the jurisdiction of the chancery court in tax matters under the circumstances set out in the bill of complaint, for the reason that the tax laws provided an administrative remedy in cases where an additional income tax assessment was made. It is alleged that the taxpayers, appellants here, refused to post the required bond and proceed in the manner provided. Defendants further alleged that § 9220-27 (9), Code 1942, Rec., prohibits the chancery court from enjoining the collection of income taxes.

On motion of defendants, the cause was set for hearing
65 on the special plea above set forth. The plea to the jurisdiction was first overruled. The complainants then presented a motion requesting the court to

strike the answer of defendants to the original bill." When this argument was heard on the motion, the chancellor entered a final decree holding complainants refused to avail themselves of the statutory administrative procedure, and that complainants have no standing in the chancery court since it is without jurisdiction. The bill of complaint was dismissed, and from that decree this case is now on appeal to this Court. Dexter Barr was substituted as party-defendant instead of Noel Monaghan.

Appellants argue that there is "really one question in this case" and that "the question is whether or not appellees have authority to destroy returns of taxpayers and then force those same taxpayers to appear before them, administratively to prove those returns were correct."

There are several statutes involved in the question presented here, and the Code sections, and parts of Code sections, applicable to this case, are annexed hereto as Notes.

We are confronted at the threshold of this appeal with the question raised by the plea, namely, whether or not the taxpayer-appellants, as a prerequisite to the invoking of judicial aid, should have exhausted their administrative remedies before the Tax Commission as provided by the foregoing Code section.

It has been said: "The last century has witnessed the rise of a new instrument of government, the administrative tribunal. In its mature form, it is difficult to find its parallel in our earlier political history; its development seems indigenous. The rapidity of its growth, the significance of its power, and the implications of its being, are such as to require notice of the extent to which this new 'administrative law' is weaving itself more and more into our governmental fabric." The Administrative Process by Landis, p. 1.

The hallowed ideal of separation of powers in government as a political maxim is ancient and its worth has been

proven. Our tripartite form of government has, nevertheless, readily adopted and smoothly adjusted the old rules of law to this new tool. Its importance has been magnified until it is sometimes called "fourth estate." It is said that: "In recent years there has been a pronounced movement toward the enactment of general statutes containing codes of procedure to be followed by regulatory agencies. A model or uniform act has been drafted, and a dozen or so states have adopted administrative procedure acts. * * * In 1946 Congress enacted the Administrative Procedure Act, which provides a new, basic, and comprehensive regulation of procedures in most federal agencies." 2 Am. Jur. 2d, Administrative Law, § 201, p. 52. To say the least, administrative law has become a very effective tool in the administration of a modern, complicated government. Lawbook writers are taking notice of rapidly developing field of Administrative Law, as will be seen by the correlated subjects of public administration under 2 Am. Jur. 2d, p. 20.

One of the new rules growing out of administrative law is that known as exhaustion of administrative remedies. The above-mentioned textwriter points out in §595, p. 426, as follows: "The doctrine of exhaustion of administrative remedies requires that where a remedy before an administrative agency is provided, relief must be sought by exhausting this remedy before the courts will act. This doctrine is well established, is a cardinal principle of practically universal application, and must be borne in mind by the courts in construing a statute providing for review of administrative action. Thus, frequent reference is made to the long-settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted. Basically the doctrine of exhaustion of administrative remedies is a product of judicial self-limitation, but in certain instances the doctrine, or principles involved therein, are directly

related to express statutory provisions. * * * The doctrine of exhaustion of administrative remedies is sometimes said to rest upon the presumption that the administrative agency, if given a complete chance to pass upon the matter, will decide correctly * * *." It is also pointed out under § 596, p. 429: "The doctrine of exhaustion of administrative remedies is merely one aspect of the broader doctrine which requires final administrative action as a prerequisite of judicial review.

"Since the doctrine of exhaustion of remedies is most frequently invoked in equity proceedings, it should be noted that the doctrine under which no equitable relief is available where there is an adequate remedy at law has been extended to embrace administrative remedies. Moreover, this equitable doctrine, while resembling the doctrine of exhaustion of administrative remedies, is far broader than the exhaustion doctrine because it also applies where there is available a remedy at law outside of the administrative process. * * *"

There are many cases cited on tax and assessment authorities, Note 1, p. 426 of the foregoing text.

69 Mississippi has followed the great weight of authorities requiring persons to exhaust their administrative remedies before resorting to court. In the case of Scott v. Lowe, 223 Miss. 312, 78, So. 2d 452, cited under Note 2 of § 596, p. 429, of the above-mentioned text, this Court said: "This case raises for the first time the question of whether a civil service employee of a city can obtain a judicial review by injunction in chancery of an action of municipal officers allegedly affecting his job, or whether the statutory method of appeal provided for in such cases is his exclusive remedy." In answer to that question, this Court held: "* * * We think that appellee has a plain, speedy, adequate and complete remedy at law and accordingly she must pursue the statutory method of appeal."

In the case of Morehead v. Miss. Saftey-Responsibility Bureau, 232 Miss. 412, 99 So. 2d 446, it is said: "The law is well-settled that where an administrative remedy is provided by statute, relief must be sought by exhausting this remedy before the courts will act. Many of the decisions lay stress upon the fact that any other rule would overcrowd the dockets of the courts. 42 Am. Jur., Public Administrative Law, Section 197, p. 580."

70 This rule has been universally followed. See the following cases: Deering Milliken, Inc. v. Johnston, 295 F. 2d 856; Harrington v. Glidden, 179 Mass. 486, 61 N. E. 54; Malone Freight Lines, Inc. v. U. S., 204 F. Supp. 745 (Ala. 1962); Natural Gas Pipeline Company v. Slattery, 302 U. S. 300; Dalton Adding Machine Company v. The State Corporation Commission of the Commonwealth of Virginia, 236 U. S. 699; First National Bank of Greeley v. Board of County Commissioners of the County of Weld, 264 U. S. 450; Postal Telegraph Cable Company v. City of Fremont, 103 Neb. 476, 255 U. S. 124; Gorham Mfg. Company v. State Tax Commission of the State of New York, 266 U. S. 265.

The following textbooks hold to the rule that: "The doctrine of exhaustion of administrative remedies requires that where an administrative remedy is provided by statute, relief must be sought by exhausting this remedy before the courts will act." 42 Am. Jur., Public Administrative Law, § 197, p. 589; Administrative Law Treatise by Davis, Vol. 3, § 20.9, p. 186; Administrative Law by Forkosch, § 298, p. 553; Harvard Law Review, Vol. 51, p. 1261.

This rule is also shown under the subject of Taxation, 51 Am. Jur., § 769, p. 698, wherein the textwriter

71 said: "In the light of widely varying statutory provisions, the broad view has received expression, with respect to different particular factual situations, and in widely divergent language, that failure on the part of one seeking an abatement of his tax assessment to invoke an

available administrative remedy, or, if invoked, to pursue the possible administrative appeals to exhaustion, prevents entirely, or in some way limits, his obtaining any relief from the courts with respect to the amount or the legality of the challenged assessment."

The rule is expressed in 84 C. J. S., Taxation, § 513, pp. 981-982, in the following language: "Where the error or irregularity complained of is not such as to annul and render the tax itself utterly void, if administrative boards or officers are established by law for the review and correction of assessments, the remedy thus provided is exclusive and is the only one available in the first instance for the purpose of granting relief falling within the powers conferred on such administrative agencies, unless an alternative procedure, judicially or otherwise, is expressly made available as a method of reviewing and correcting assessments. The rule operates to bar either a direct application for review or correction of the assessment addressed to any other body, in the first instance, or a collateral attack, either at law or in equity, on the assessment in the event of a failure to bring the matter properly before the administrative agency established for the purpose of review and correction." Other cases that should be cited are Williams, Treasurer of the State of Arizona v. Bankers' National Ins. Co., 297 P. 2d 844, 80 Ariz. 294 (1956); People v. West Publishing Co., 216 P. 2d 441 (Cal. 1950); U. S. v. Superior Court, 120 P. 2d 26 (Cal. 1941).

Appellants had an administrative remedy to "file an appeal and show cause or reason why the tax or deficiency should not be paid" § 9220-25-(7), Code 1942, Rec. The Taxpayer also had the right to appeal to the State Tax Commission and thereafter file a petition in the chancery court, accompanied by a bond in a sum double the amount in controversy. See. 9220-34, Code 1942.

Appellants did not pursue their remedy provided by law before the State Tax Commission, nor did they post the required bond with their petition in the chancery court. They alleged that their reason for failing to follow the statutory procedure is based upon two propositions:

(1) It is contended that the Tax Commission exceeded its authority because the law (§ 9220-31, Code 1942, Rec.) required that: "As soon as practical after the return is filed, the commissioner shall examine it; if it then appears that the correct amount of tax is greater or less than that shown in the return, the tax should be recomputed * * *" It is said, however, these tax returns were destroyed and therefore the Tax Commissioner's capacity to examine them was lost, and since they were presumed to be correct, the Tax Commission lost jurisdiction of assessment.

The fallacy of this argument becomes apparent by an examination of the foregoing Code Section, as Amended by Chap. 554, Laws of 1958, in cases where a change has been made by the Internal Revenue Service of the reported net income of the taxpayer. This section applies to the previous tax laws before the amendment, as is shown by (7) as follows: "If upon examination of a return made under this act or income tax laws previously in effect, a tax or a delinquency in tax is discovered, the taxpayer shall be notified thereof and given a period of not more than sixty (60) days after such notice is sent by mail in which to file an appeal and show cause or reason why the tax or deficiency should not be paid."

A taxpayer has no vested right in the statutory method of collecting taxes and a change in the method of collecting taxes is not a violation of due process of law, and the Legislature may adopt new remedies for the collection of taxes and apply them to taxes already delinquent without any violation of the Federal Constitution. See Schreiber v. Cook County, 388 Ill. 297, 58 N. E.

2d 40, 55 A. L. R. 1162; Anno. 77 A. L. R. 1034; 51 Am. Jur., Taxation, § 990, p. 866.

We do not believe that the mere fact that the original returns filed by appellants were destroyed by the Tax Commission under the authority of §§ 9216, 9217, Code 1942, Rec., relieves the taxpayer from payment of taxes due, because it was the duty of the taxpayer to make known to the State Tax Commissioner the change in net income made by the Internal Revenue Service. See § 9220-25 (4), Code 1942, Rec. It is not within the Tax Commissioner's power to forgive taxes due by an individual, and the destruction of tax returns does not relieve the taxpayer from taxes owed to the State.

(2) It is next contended that § 9220-26 (2), as it was written prior to the 1958 Amendment, required that income tax be determined and assessed within three years from the date the return was filed, except the three-year statute was extended to six years in cases where the reported net income of the taxpayer had been increased by the Bureau of Internal Revenue. Appellants point out that the last year reported was 1954, and that the report was due on or before April 15, 1955, and which was admittedly filed. It said: "Adding six years for the running of the statute of limitations as prescribed by the above-quoted section and the resulting date is April 15, 1961. * * * Thus it is seen that, April 15, 1961, appellants were vested by law with complete assurance that no claim could be made for additional State income taxes for the year 1954 and years prior thereto."

This argument is not now tenable, because appellants did not plead the six-year statute of limitations in their original bill, nor did they pursue their administrative remedy to show cause under the original § 9220-25 (3), Code 1942, or the Amendment thereto, as set out in Chap. 354, § 7, of the Laws of 1958. This Court has followed the universal rule that a statute of limitation—or a de-

fense by a plea setting up the limitation of action—defense is personal and must be pleaded affirmatively in order for a defendant to take advantage of it. Lewis v. Buckley, 73 Miss. 50, 19 So. 107; Anderson v. McNeal, 82 Miss. 542, 34 So. 1; Patterson v. Ingraham, 23 Miss. 87; Hendricks v. Pugh, 57 Miss. 157; Bridgeforth v. Payne, 62 Miss. 777.

"There is another rule of Administrative Law closely allied to the "exhaustion of remedy" rule known as "exclusive administrative jurisdiction rule", and is expressed in 2 Am. Jur. 2d. Administrative Law, § 779, p. 679, as follows: "Unless there is a clear indication of a contrary legislative intent, if the legislature provides a remedy before an administrative agency which meets the demands of due process of law and does not invade the constitutional jurisdiction of a court, a court may be deemed to have no jurisdiction in the premises." The latter rule applies where a claim or demand is cognizable in the first instance by an administrative agency alone. 2 Am. Jur. 2d. § 790, p. 691.

This Court, and other courts, however, have held that where there is a void assessment, or where the law is unconstitutional, a taxpayer may seek relief in the courts in the first instance. See City of Hattiesburg v. New Orleans & N. E. R. Co., 141 Miss. 497, 106 So. 749; Edgerton v. International Company, Inc., 89 So. 2d 488 (Fla.); 42 Am. Jur., Public Administrative Law, § 68, p. 379.

It is also the rule that the law does not require one to pursue administrative remedies before resorting to court when the remedy would be of no avail. See Cook v. Di Domenico, 135 So. 2d 245 (Fla. 1961); The Crown Life Insurance Company v. Falla De Falla, 137 So. 2d 849 (Fla. 1962); City of Holly Hill v. State, 132 So. 2d 29 (Fla. 1961.)

The validity of the tax laws in this case is not challenged, and there is nothing in this record to show that the remedies provided by statute would have been of no avail

to appellants, and we have therefore, after careful consideration of the foregoing authorities and rules of administrative law, come to the conclusion that the Tax Commission had exclusive jurisdiction of the income tax assessment due by appellants, and before appellants could invoke the aid of an equity court, it was necessary for them to have first proceeded by the method and through the channel provided by law before the Tax Commission. (§9220-31, Code 1942, Rec.) Appellants should have presented their defense to the assessment for income tax, including the defense of limitation of action, to the Tax Commission at the time appellants were given notice "to file an appeal and show cause or reason why the tax or deficiency should not be paid." §9220-25 (7), Code 1942, Rec.

We are of the further opinion that §9220-27 (9), Code 1942, as Amended, applies to the facts in this case, and prohibited the issuance of an injunction restraining the collection of taxes due by appellants.

Finally, Appellants neither complained that they were deprived of the defense of the limitation of action, nor that the assessment was erroneous. Appellants chose to challenge the authority of the State to impose the tax by bill in chancery, taking the risk that if such authority existed, their position in court would be that of delinquent taxpayers that had failed to exercise their administrative remedy. If the Commissioner were in error in making the assessment, this could have been avoided by giving the information to the Tax Commission. (Cf. West Publishing Company v. McColgan, Franchise Tax Comm'r, 166 P. 2d 861 (Cal. 1946).) We are of the opinion therefore that the decree of the Chancery Court of Hinds County dismissing the original bill should be, and is, hereby affirmed.

AFFIRMED.

McGEHEE, C. J., AND GILLESPIE, McELROY AND BRADY, JJ., Concur.

NOTES: § 9220-25 (1), Code of 1942: "Returns shall be examined by the commissioner within three (3) years from the due date or the date the return was filed, whichever is later, and no determination of a tax overpayment or deficiency shall be made by the commissioner, and no suit shall be filed with respect to income within the period covered by such return, after the expiration of said three-year period except as hereinafter provided.

* * * * * *

"(3) When an examination of a return made under this act has been commenced, and the taxpayer notified thereof by regular mail, within the three-year examination period provided in subsection (1) of this section, the determination of the correct tax liability may be made by the commissioner after the expiration of said three-year examination period, provided that said determination shall be made with reasonable promptness and diligence.

"(4) Where the reported net income of a taxpayer has been increased or decreased by the internal revenue service, the three-year examination period provided in subsection (1) of this section shall not be applicable in so far as the Mississippi income tax liability is affected by the specific changes made by said internal revenue service. A taxpayer who, without action by the commissioner, amends a return filed under this act on the basis of a change in net income made by the internal revenue service, and pays additional tax due thereon within sixty (60) days after agreeing to the federal change (and has received statement of the federal changes to which agreement has been made) or payment thereof, shall add interest to the additional tax at the rate of one-half of one per centum (½ of 1%) per month, or part thereof, from

the due date of the original return. If additional tax is assessed by the commissioner under subsection (2) of this section, and on the basis of a change in net income by the internal revenue service, then, in addition to the interest last above described, there may be added a penalty of ten per centum (10%) of the additional tax. Provided, that, in either the case of a voluntary amendment of a return by the taxpayer, or the assessment of additional tax by the commissioner, on the basis of a change in net income by the internal revenue service, if any part of the deficiency is due to fraud with intent to evade tax, there shall be added a penalty of not more than one hundred per centum (100%) of the tax.

. . . . . .

"(6) A taxpayer may apply to the commissioner for revision of any return filed under this act at any time within three (3) years from the due date, or the date the return was filed, whichever is later. Provided, that where the reported net income has been reduced by the internal revenue service this limitation shall not be applicable in so far as the Mississippi income tax liability is affected by the specific changes made by said internal revenue service.

"(7) If, upon examination of a return made under this act or income tax laws previously in effect, a tax or a deficiency in tax is discovered, the taxpayer shall be notified thereof and given a period of not more than sixty (60) days after such notice is sent by mail in which to file an appeal and show cause or reason why the tax or deficiency should not be paid. Opportunity for a hearing before the commissioner shall be granted and a final decision thereon shall be made as quickly as practicable, and any tax or deficiency in tax found due after such hearing shall be assessed and paid, together with damages and interest, if applicable thereto, within ten (10) days after notice and demand by the commissioner."

Section 9220-26 (2), Code of 1942, Rec.: "* * * provided, that the three (3) year statute of limitation shall be extended to six (6) years in case where the reported
82 net income of a taxpayer has been increased by the bureau of internal revenue for any taxable period * * *"

Section 9220-26, Code of 1942, Rec. (As Amended by Chap. 254, Laws 1958): "If no return is made by any taxpayer required to make a return as provided herein, the commissioner shall give written notice by certified mail to such taxpayer to make a return within thirty (30) days from the date of such notice, and if such taxpayer shall fail to make such a return as he may be required to make in such notice, then the taxpayer's liability shall be determined by the commissioner from the best information available, and such determination shall be prima facie correct for the purpose of this act. To any tax determined to be due under this section, either by the taxpayer or the commissioner, there shall be added by the commissioner a penalty of not more than one hundred per centum (100%) and interest at the rate of one per centum (1%) per month, or part thereof, from the time the return was due until paid; provided, however, in the event such taxpayer, in answer to said notice from the commissioner, shall state that he is not required under the law to make such returns, the commissioner shall investigate that question fully before proceeding further under this section."

83 "Section 9220-27, Code 1942, Rec.: "* * * (9) Enforcement not to be Enjoined.—No injunction shall be awarded by any court or judge to restrain the collection of the taxes imposed by this act, or to restrain the enforcement of this act. The provisions of section 1340, code of 1942, and amendments thereto, shall not apply to taxes imposed by this act."

Section 9220-31, Code 1942, Rec.: "If the taxpayer or the attorney general is aggrieved by the decision of the

commissioner, he may appeal to the state tax commission. In all hearings before the commission under this act, oral, documentary and other evidence may be introduced by either party and the findings of the commission shall be final, unless the taxpayer, or the state, by the attorney general, shall, within thirty (30) days from the date of the receipt of notice of such findings, file a petition in the chancery court of Hinds County, at the seat of government, requesting a hearing of the case on its merits, which petition shall be a concise statement of the facts as contended for by the party dissatisfied with the findings of the commission. If the taxpayer be the party filing said petition, it shall be accompanied with a bond, to be approved by the clerk of said court, in a sum double the amount in controversy, conditioned to pay the judgment of the court. On filing such petition, the clerk of the court shall give the opposite party (the attorney general, if the petition is filed by the taxpayer) notice of the proceedings as required by law. The chancery court shall have jurisdiction to hear and determine said cause, or issue joined as in other cases. If the petition be filed by the attorney general for the state, and the taxpayer be not a citizen of Hinds County, upon application of the taxpayer, the suit shall be transferred to the county in this state of which the taxpayer is a citizen. Or the attorney general may file his petition in the first instance in the chancery court of the county of which such taxpayer is a citizen, which court in either case shall have jurisdiction to hear and determine the case on issues joined therein. Either the state or the taxpayer, or both, shall have the right to appeal to the supreme court, as in other cases. In any hearing before the tax commission, two members constitute a quorum.

## APPENDIX D

[110] Monday, January 13th 1964 Court Sitting

No. 42,791

IKE J. DAVIS and MRS. BERT EVELYN DAVIS

vs.

DEXTER BARR, Chairman, State Tax Comm.

This cause this day came on to be heard on the suggestion of error filed herein and this Court having sufficiently examined and considered the same and being of the opinion that the same should be overruled doth order and adjudge that said suggestion of error be and the same is hereby overruled, and the motion to modify be and the same is hereby overruled.

Minute Book "BX" Page 92

## APPENDIX E

[106] November 29th, 1963

Honorable Dexter Barr, Chairman
Mississippi State Tax Commission
Jackson, Mississippi

Re: Ike J. Davis and Mrs. Bert Evelyn Davis
Additional Assessment of Income Tax 1945-1954

Dear Sir:

During the year 1961 an additional assessment of income tax was made against these tax payers for the years 1945 through 1954. The initial assessment proposed by a letter of Mr. Eason dated July 19, 1961 was for the amount of $3,112.83 and covered the years 1945, 1946 and 1947. Later the proposal was altered to include the additional years 1946 through 1954 and the amount was increased to $13,393.16 which included interest and penalties.

We were convinced that the additional assessment was unauthorized and immediately resorted to the courts. We have now been remanded to the administrative channels and desire a hearing before the Income Tax Commissioner for the purpose of protesting this assessment.

Please advise us immediately when such a hearing can be had.

Yours very truly,

LYLE V. OREY

LVO:ad

cc: Honorable John E. Stone
Honorable deQuincy V. Sutton

## APPENDIX F

[107]

STATE TAX COMMISSION
JACKSON, MISSISSIPPI

December 3, 1963

Honorable Lyle V. Corey
Attorney at Law
P. O. Box 1413
Meridian, Mississippi

Re: Ike J. and Bert Evelyn Davis

Dear Mr. Corey:

This is to acknowledge receipt of your letter in which you state that this cause has now been remanded to the administrative channels and that you desired a hearing thereon.

There are several reasons why we cannot comply with your request: First, you have filed a motion in the Supreme Court indicating that you desired to file a Suggestion of Error in this cause and certainly it would not be proper procedure to set an administrative hearing as long as there is anything pending in the Supreme Court; second, neither the Final Decree of the Chancery Court of Hinds County nor the opinion of the Supreme Court of Mississippi remanded this cause for administrative hearings, both Courts finding that they were without jurisdiction in the premises by reason of the failure of the taxpayer to resort to their administrative remedies, and third, the taxpayers in this instance have failed to comply with *Section 9229-23 (74)* Mississippi Code of 1942, and request a hearing before the Commissioner within sixty days after notice of the assessment of the tax.

Yours very truly,

DEXTER BARR

Dexter Barr, *Chairman*

Honorable Delbanco V. Sutton
Attorney at Law
Lamar Hotel

## APPENDIX G

[108]

December 9th, 1963

Honorable Dexter Barr, Chairman
State Tax Commission
Jackson, Mississippi

Re: Ike J. and Mrs. Bert Evelyn Davis

Dear Sir:

I have your letter of December 3rd. Pursuant to the provision of Section 9220-30 and 9220-31 of the Mississippi Code of 1942 (Recompiled), the tax payer requests an appeal from the decision contained in your letter above referred to to the State Tax Commission.

Please advise me immediately when such appeal will be heard.

Yours very truly,

LYLE V. COREY

LVC:ad

cc: Hon. John E. Stone
Hon. deQuincy V. Sutton

## APPENDIX H

[109]

STATE TAX COMMISSION
JACKSON, MISSISSIPPI

December 11, 1963

Honorable Lyle V. Corey
Attorney at Law
P. O. Box 1413
Meridian, Mississippi

Re: Ike J. and Mrs. Bert Evelyn Davis

Dear Mr. Corey:

This is to acknowledge receipt of your letter of December 9 in which you request an appeal to the State Tax Commission from the decision contained in my letter of December 3.

As stated to you in my letter of December 3 this matter is still pending in the Supreme Court and even if you were entitled to a hearing before the Commission it could not be granted while the matter is pending in Court.

It is further my opinion that you are not entitled to a hearing before the full Commission since you, under the law, are not entitled to a hearing before Commissioner. Time for appeal to the Commission and Commissioner has long since expired. Therefore, your request cannot be granted.

Yours very truly,

s/ DEXTER BARR
Dexter Barr, *Chairman*
*Mississippi State Tax Commission*

cc: Honorable DeQuitter V. Sutton
Attorney at Law
Lamar Hotel
Meridian, Mississippi

# APPENDIX I

## Pertinent Extracts

## Mississippi State Income Tax Law

## (Sec. 9220 Miss. Code 1942 Rec.)

§ 9220-25. Examination of returns and additional taxes.

(b) Returns shall be examined by the commissioner within three (3) years from the due date or the date the return was filed, whichever is later, and no determination of a tax overpayment or deficiency shall be made by the commissioner, and no suit shall be filed with respect to income within the period covered by such return, after the expiration of said three-year period except as hereinafter provided.

(2) If, upon examination of a return made under this act or income tax laws previously in effect, it appears that the correct amount of tax is greater or less than that shown in the return, the tax shall be recomputed. Any overpayment of tax so determined shall be credited or refunded to the taxpayer. Any tax deficiency so determined shall be assessed immediately by the commissioner, together with interest thereon at the rate of one half of one per centum ($\frac{1}{2}$ of 1%) per month, or part thereof, from the due date of the return. If any part of the deficiency is due to negligence, there may be added a penalty of ten per centum (10%) of the tax, and interest at the rate of one per centum (1%) per month, or part thereof, from the date the tax was due until paid; and if any part of the deficiency is due to fraud with intent to evade tax, then there shall be added a penalty of not more than one hundred per centum (100%) of the tax, plus interest at the rate of one per centum (1%) per month, or part thereof, from the date the tax was due until paid.

(3) When an examination of a return made under this act has been commenced, and the taxpayer notified thereof

by regular mail, within the three-year examination period provided in subsection (1) of this section, the determination of the correct tax liability may be made by the commissioner after the expiration of said three-year examination period, provided that said determination shall be made with reasonable promptness and diligence.

(4) Where the reported net income of a taxpayer has been increased or decreased by the internal revenue service, the three-year examination period provided in subsection (1) of this section shall not be applicable in so far as the Mississippi income tax liability is affected by the specific changes made by said internal revenue service. A taxpayer who, without action by the commissioner, amends a return filed under this act on the basis of a change in net income made by the internal revenue service, and pays additional tax due thereon within sixty (60) days after agreeing to the federal change (and has received statement of the federal changes to which agreement has been made) or payment thereof, shall add interest to the additional tax at the rate of one half of one per centum (½ of 1%) per month, or part thereof, from the due date of the original return. If additional tax is assessed by the commissioner under subsection (2) of this section, and on the basis of a change in net income by the internal revenue service, then, in addition to the interest last above described, there may be added a penalty of ten per centum (10%) of the additional tax. Provided, that in either the case of a voluntary amendment of a return by the taxpayer, or the assessment of additional tax by the commissioner, on the basis of a change in net income by the internal revenue service, if any part of the deficiency is due to fraud with intent to evade tax, there shall be added a penalty of not more than one hundred per centum (100%) of the tax.

(5) The three-year examination period provided in subsection (1) of the section shall not be applicable in the case of a false or fraudulent return with intent to evade tax.

(6) A taxpayer may apply to the commissioner for revision of any return filed under this act at any time within three (3) years from the due date, or the date the return was filed, whichever is later. Provided, that where the reported net income has been reduced by the internal revenue service this limitation shall not be applicable in so far as the Mississippi income tax liability is affected by the specific changes made by said internal revenue service.

(7) If, upon examination of a return made under this act or income tax laws previously in effect, a tax or a deficiency in tax is discovered, the taxpayer shall be notified thereof and given a period of not more than sixty (60) days after such notice is sent by mail in which to file an appeal and show cause or reason why the tax or deficiency should not be paid. Opportunity for a hearing before the commissioner shall be granted and a final decision thereon shall be made as quickly as practicable, and any tax or deficiency in tax found due after such hearing shall be assessed and paid, together with damages and interest, if applicable thereto, within ten (10) days after notice and demand by the commissioner.

§ 9220-30. Appeals.

A taxpayer who feels aggrieved at any action of, or decision by, the commissioner under sections 24 [§ 9220-25] or 25 [§ 9220-26] of this act may appeal to the commissioner for a hearing in the matter within thirty (30) days from the date of said action or decision. The commissioner shall grant a hearing thereon which shall be held within sixty (60) days from the date of said appeal unless the commissioner decides that said hearing be held at a later date. At said hearing the commissioner shall try the issues presented, according to the law and the facts, and shall, within thirty (30) days from the date of said hearing, notify the taxpayer of his determination. Any overpayment of tax determined by the commissioner shall be

credited, or refunded, to the taxpayer. Any tax deficiency, including any penalty and interest, determined by the commissioner shall be paid within sixty (60) days from the date of notification of the taxpayer and if said sum is not paid within said sixty-day period, the commissioner shall proceed to collect same under the provisions of section 26 (§ 9220-27) of this act: provided, that within said sixty-day period the taxpayer may appeal to the state tax commission from the decision of the commissioner, as hereinafter set out.

§ 9220-31. Rehearing.—If the taxpayer or the attorney general is aggrieved by the decision of the commissioner, he may appeal to the state tax commission. In all hearings before the commission under this act, oral, documentary and other evidence may be introduced by either party and the findings of the commission shall be final, unless the taxpayer, or the state, by the attorney general, shall, within thirty (30) days from the date of the receipt of notice of such findings, file a petition in the chancery court of Hinds County, at the seat of government, requesting a hearing of the case on its merits, which petition shall be a concise statement of the facts as contended for by the party dissatisfied with the findings of the commission. If the taxpayer be the party filing said petition, it shall be accompanied with a bond, to be approved by the clerk of said court, in a sum double the amount in controversy, conditioned to pay the judgment of the court. On filing such petition, the clerk of the court shall give the opposite party (the attorney general, if the petition is filed by the taxpayer) notice of the proceedings as required by law. The chancery court shall have jurisdiction to hear and determine said cause, or issue joined as in other cases. If the petition be filed by the attorney general for the state, and the taxpayer be not a citizen of Hinds County, upon application of the taxpayer, the suit shall be transferred to the county in this state of which the taxpayer is a citizen. Or the attorney general may file his petition in the first instance in the chancery court of the county of which such

taxpayer is a citizen, which court in either case shall have jurisdiction to hear and determine the case on issues joined therein. Either the state or the taxpayer, or both, shall have the right to appeal to the supreme court, as in other cases. In any hearing before the tax commission, two members constitute a quorum. [Supersedes § 9252, Code of 1942.]

§ 9220-30. Refunds.

If, upon examination of any return made hereunder, it appears that an amount of income tax has been paid in excess of that properly due, then the amount in excess shall be credited against any income tax or installment thereof then due from the taxpayer, under any other return required by this act, and any balance of such excess shall be certified to the auditor of public accounts by the commissioner of income tax. The said auditor is hereby authorized and required to make such investigation and audit of the claim as he finds necessary. If he finds that the commissioner of income tax is correct in his determination, he may require of the taxpayer a statement as to the sum to be refunded and, upon the filing of such statement by the taxpayer, the auditor may issue his warrant to the state treasurer in favor of the taxpayer for the amount of tax erroneously paid into the state treasury.

§ 9220-40. Prior rights or actions not affected.

Provided, however, that nothing in this Act shall affect or defeat any claim, suit, right or cause of action for taxes due or accrued under the provisions of Chapter 402, Laws of 1952 [§§ 9220-01 et seq.], as amended, prior to the effective date of this Act, whether such claim, suit, right or cause of such action shall have been begun before the effective date of this Act, or thereafter begun, and the provisions of said Chapter 402, Laws of 1952 [§§ 9220-01 et seq.], as amended, are hereby continued in full force, effect and operation for such purpose.

## APPENDIX J

### Constitution of the State of Mississippi

### Sections 14, 24

"Section 14. No person shall be deprived of life, liberty, or property except by due process of law.

"Section 24. All courts shall be open; and every person for an injury done to him in his lands, person, or reputation, shall have remedy by due course of law, and right and justice shall be administered without sale, denial, or delay."

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## APPENDIX K

### Consti. tion of the United States
### Fourteenth Amendment

"AMENDMENT XIV

SEC. 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

## APPENDIX L

(50) EXHIBIT "A"

STATE TAX COMMISSION

Bennett Smith
Excise Commissioner

Army Rhoden
Ad Valorem Commissioner

Noel Monaghan, Chairman
Jackson, Mississippi

Hon. deQuincy V. Sutton
Attorney at Law
Dixie Towers
Meridian, Mississippi

April 5, 1961
IT 365 38-3012
HNE:owa

Re: Ike J. and Mrs. Bert E. Davis
Meridian, Mississippi

Dear Mr. Sutton:

Thank you for your letter dated April 3, 1961, relating to the income tax returns of the above-named individual.

You request copies of the income tax returns filed by these individuals for the year 1945 to 1954, inclusive, but you are advised such returns are not in the record here. They have been destroyed and it is to be regretted we may not comply with your request.

With every good wish, I am

Sincerely yours,

/s/ H. N. Eason
H. N. Eason, Chief

FILED
Sep 18 1962
FRANK T. SCOTT
Chancery Clerk
By Eva Perkins D. C.

## APPENDIX M

[33] EXHIBIT "1"

TCO-1

### Transcript of Order, State Tax Commission, Jackson, Mississippi

STATE OF MISSISSIPPI / ss OFFICE STATE TAX COMMISSION
COUNTY OF HINDS / June 1, 1961

BE IT REMEMBERED THAT on the date stated above the State Tax Commission of said state adopted an order in words and figures as follows, to-wit:—

IN THE MATTER OF THE DISPOSITION OF OLD RECORDS OF THE INCOME AND FRANCHISE TAX DIVISION.

There came on for consideration on this the 1st day of June, 1961, the matter of the destruction and disposition of certain old records as provided in Sections 9216 and 9217, Code of 1942.

It appears that the statutes of this State, as contained in said sections authorizes the Commission, by order, to "destroy or otherwise dispose of such records, documents, and papers which have been preserved for the time required by law", and "when considered useless".

It further appears that the Secretary of the Commission has on file a letter from the Chief of the Division requesting records to be destroyed. The requests are as follows:

"Dear Mr. Monaghan:

The last sentence of Section 34 (1) (Code Section 9220-35(1)), of the Income Tax Act of 1952 reads as follows:

"Reports and returns shall be preserved for three years and thereafter until the Commissioner orders them to be destroyed."

[34] This provision has been unchanged in the Income Tax Law since 1924.

The present congestion in the files is greater than it has ever been and, for that reason, I request authority to remove from the files here all returns, correspondence and reports received here prior to May 1, 1958.

With kindest regards and best wishes, I am

Sincerely yours,

/s/

H. N. Eason, Chief
Division of Income Tax"

. . . . . .

IT IS, THEREFORE, ORDERED and ADJUDGED, That the said request be and is hereby approved, and that all such papers, records, and documents be removed from the files under the supervision of persons designated by the Chief of the Division.

ORDERED and ADJUDGED this the 1st day of June, 1961.

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## SECRETARY'S CERTIFICATE

I, H. P. Taylor, Secretary of the State Tax Commission of the State of Mississippi, do hereby certify that the above and foregoing is a true and correct copy of an order adopted by the said Commission on the date therein stated as the same appears of record in Minute Book "T" at Pages 531 and 532, an official record in said office and in my official care and custody.

Witness my signature this the 15th day of May, 1962.

/s/ H. P. TAYLOR,
Secretary,
State Tax Commission

FILED
May 16 1962
FRANK T. SCOTT
Chancery Clerk
By /s/ EVA PERKINS, D. C.

## APPENDIX N

[24] Book 217 Page 122

IN THE CHANCERY COURT OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI

No. 60947

IKE J. AND BERT EVELYN DAVIS, *Complainants*

vs.

NOEL MONAGHAN, INDIVIDUALLY AND AS CHAIRMAN OF THE MISSISSIPPI STATE TAX COMMISSION, AS EX OFFICIO COMMISSIONER OF STATE INCOME TAX and

H. N. EASON, INDIVIDUALLY AND AS CHIEF OF MISSISSIPPI STATE TAX COMMISSION, DIVISION OF INCOME TAX, *Defendants*

### Decree Overruling Demurrer of Defendants

Came this cause into open Court, the parties by their solicitors, on full hearing of the demurrer of defendants against the bill of complaint and the Court, after statements and arguments of counsel, being advised in the premises, is of the opinion that said demurrer should be overruled and same is hereby overruled, and the defendants are hereby granted thirty days time from the date of this Decree within which to plead.

ORDERED, ADJUDGED and DECREED this the 1st day of May, 1962.

/s/ S. V. ROBERTSON, JR.
Chancellor.

FILED
May 1—1962
FRANK T. SCOTT
Chancery Clerk
By /s/ RUTH MAY D. C.

## APPENDIX O

[38] BOOK 219 PAGE 378

IN THE CHANCERY COURT OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI

No. 60947

IKE J. AND BERT EVELYN DAVIS, *Complainants*

vs.

NOEL MONAGHAN, INDIVIDUALLY AND AS CHAIRMAN OF THE MISSISSIPPI STATE TAX COMMISSION, AS EX OFFICIO COMMISSIONER OF STATE TAX and

H. N. EASON, INDIVIDUALLY AND AS CHIEF OF MISSISSIPPI STATE TAX COMMISSION, DIVISION OF INCOME TAX, *Defendants*

**Decree Overruling Plea of Defendants to Jurisdiction**

Came this cause into open Court this day, by the solicitors for the parties on motion of defendants that the bill of complaint be dismissed for lack of jurisdiction in this Court to hear and decide the same and the Court, after statements and arguments of the respective solicitors, being advised in the premises, is of the opinion that said plea should be overruled and the same hereby is

OVERRULED

ORDERED, ADJUDGED AND DECREED this the 5th day of July 1962.

J. C. STENNETT
J. C. Stennett
*Chancellor*

FILED
Jul 5—1962
FRANK T. SCOTT
Chancery Clerk
By /s/ RUTH MAY D. C.

Office Supreme Court, U.S.
FILED
MAY 1963

No. 1040

# IN THE SUPREME COURT OF THE UNITED STATES

## OCTOBER TERM, 1963

IKE F. DAVIS, ET UX — Petitioners

v.

DEXTER BARR, CHAIRMAN, MISSISSIPPI STATE TAX COMMISSION, ET AL. — Respondents

## ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI

## BRIEF OF RESPONDENTS IN OPPOSITION

JOE T. PATTERSON
Attorney General
State of Mississippi
JOHN E. STONE
Assistant Attorney General
State of Mississippi
New Capitol
Jackson, Mississippi

# IN THE SUPREME COURT OF THE UNITED STATES

## OCTOBER TERM, 1963

**No. 1040**

IKE J. DAVIS, ET UX — Petitioners

v.

DEXTER BARR, CHAIRMAN, MISSISSIPPI STATE TAX COMMISSION, ET AL. — Respondents

## ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI

## BRIEF OF RESPONDENTS IN OPPOSITION

Respondents file this their brief in opposition to Petition for Writ of Certiorari to the Supreme Court of the State of Mississippi on the ground that the aforesaid Petition not having been filed within the time provided by law, this Court is without authority to grant the petition.

The decision of the Supreme Court of the State of Mississippi was rendered in this case on a date not shown in the Petition for Certiorari (Appendix C to Petition for Certiorari, p. 30a), but the Petition for Certiorari shows that the decision overruling the Suggestion of Error was rendered on January 13, 1964. (Appendix

D to Petition for Certiorari, p. 20a). The Petition for Certiorari was filed with the Clerk of this Court on April 24, 1963, more than ninety (90) days from the date of the decision of the Supreme Court of Mississippi overruling Petitioners' Suggestion of Error in that Court.

28 USCA 2101 furnishes the jurisdictional basis of this Court in such cases:

"(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

. . . .

"(f) In any case in which the final judgment or decree of any court is subject to review by the Supreme Court on writ of certiorari, the execution and enforcement of such judgment or decree may be stayed for a reasonable time, to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court. The stay may be granted by a judge of the court rendering the judgment or decree or by a justice of the Supreme Court, and may be conditioned on the giving of security, approved by such judge or justice, that if the aggrieved party fails to make application for such writ within the period allotted therefor, or fails to obtain an order granting his application, or fails to make his plea good in the Supreme Court, he shall answer for all damages and costs which the other party may sustain by reason of the stay. . . ."

There is no showing in the Petition for Writ of Certiorari that a Justice of this Court extended the period for filing the Petition for Certiorari nor even that application for extension of time was made by Petitioners. There is certainly no authority in a Justice of the Supreme Court of Mississippi to extend the time for filing a Petition for Certiorari in this Court.

The filing of the Petition for Certiorari within the ninety days is the basis for jurisdiction of this Court. *Supreme Court Practice*, Third Edition, page 202, by Robert L. Stern and Eugene Gressman:

> "These time limits are jurisdictional. Unless an extension is obtained from a Justice of the Supreme Court or at least applied for through the Clerk . . . before the expiration of the time, the petition and record must be received in — not mailed to — the office of the Clerk of the Supreme Court by the ninetieth day. The time cannot be extended by waiver or stipulation of the parties."

28 USCA 2101 (f) does not deal with the jurisdiction of this Court but merely with the right of the lower court to stay the issuance of the mandate from that Court. It does not enlarge nor does it purport to enlarge the statutory time for the filing of the Petition for Writ of Certiorari in this Court and it is respectfully submitted that the Order of the Supreme Court of the State of Mississippi purporting to enlarge the statutory time is in fact a nullity and should be entirely disregarded by this Court in computing the time within which petitioners were required by the statute to file their petition in this Court. The aforesaid subsection deals only with the execution and enforcement of the judgment of the lower court and cannot change the provisions of 28 USCA 2101 (c) nor Rule 22 of this Court.

For the foregoing reasons it is respectfully submitted that this petition for Writ of Certiorari should be denied.

Respectfully submitted,

JOE T. PATTERSON, Attorney General
State of Mississippi

BY

JOHN E. STONE, Assistant
Attorney General
New Capitol
Jackson, Mississippi

## CERTIFICATE

I, John E. Stone, attorney for the respondents, in this cause, certify that I have this day mailed, postage prepaid to both Honorable Lyle V. Torey, P. O. Box 1413, Meridian, Mississippi, and Honorable deQuincy V. Sutton, Lamar Hotel, Meridian, Mississippi, true copies of the above and foregoing motion.

This the day of May, 1964.

Joe T. Patterson, Attorney General

By

John E. Stone, Assistant
Attorney General
New Capitol Building
Jackson, Mississippi